United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

No. 74-2284

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

No. 74-2284

THE SOCIETY OF THE PLASTICS INDUSTRY, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR;
PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR;
AND JOHN STENDER, ASSISTANT SECRETARY FOR
OCCUPATIONAL SAFETY AND HEALTH,

Respondents,

FIRESTONE PLASTICS COMPANY, A DIVISION OF
THE FIRESTONE TIRE & RUBBER COMPANY,

Intervenor,

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,

Intervenor.

On Petition For Review Of An Order Of
The Occupational Safety and Health Administration,
United States Department of Labor

BRIEF OF CHEMICAL FABRICS AND FILM ASSOCIATION,
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF CHEMICAL FABRICS AND FILM ASSOCIATION
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PRELIMINARY STATEMENT

This is an action for judicial review of, and relief from, an occupational safety and health standard issued by respondents to limit employee exposure to vinyl chloride monomer. Chemical Fabrics and Film Association is a trade association the members of which manufacture rolled goods from polyvinyl chloride. Polyvinyl chloride is manufactured from vinyl chloride monomer and contains small quantities of vinyl chloride monomer, and it is for this reason that the vinyl chloride monomer standard

applies to the Association's members. This brief amicus focuses upon the impact of the standard upon its members and others who manufacture products from polyvinyl chloride.

This brief amicus is filed in accordance with Rule 29 of the Rules of Appellate Procedure and pursuant to a Stipulation between Petitioner and Respondents dated October 31, 1974, and received by the Clerk of the Court on November 4, 1974, which Stipulation was accompanied by a supporting Affidavit of counsel for the association.

ISSUES PRESENTED

1. Whether the vinyl chloride monomer standard must be supported by substantial evidence in the record considered as a whole.

2. Whether there is not substantial evidence in the record considered as a whole to establish the feasibility of the standard and to sustain its notice and labeling requirements.

STATEMENT OF THE CASE

The vinyl chloride monomer standard being reviewed here was signed on October 1, 1974, by John H. Stender, Assistant Secretary of Labor for Occupational Safety and Health, and was published in the Federal Register on October 4, 1974,39 Fed. Reg. 35890 (Appendix to the Briefs ("App.") 001). This standard, a "permanent one", followed upon an "emergency temporary standard" for vinyl chloride monomer that the Assistant Secretary published

on May 10, 1974, 39 Fed. Reg. 16896. Section 6 of the Occupational Safety and Health Act (29 U.S.C. § 655) (hereinafter "the Act") which provides for the issuance of such standards, limits the effectiveness of a temporary emergency standard to six months.

Vinyl chloride monomer ("VCM") is a gas at normal atmospheric temperatures and pressures. VCM is a petrochemical product. It is used to manufacture polyvinyl chloride ("VC"), which is a resin, generally in powder or pellet form, that in industrial conditions has contained very small but varying amounts of unreacted, or "free", VCM. In turn, PVC is used, at the "fabrication" stage, to produce a wide variety of products including both supported and unsupported vinyl materials in rolled goods form.

The supported materials are composed of a plastic coating material and a supporting substrate (usually an industrial fabric). The unsupported materials are continuous plastic films or sheetings (depending on the thickness), neither of which is supported by a substrate material. Upon production in rolled good form, these materials may be directly incorporated into finished products or further processed into other finished products. These materials are used extensively in the transportation industry, in automobiles (upholstery, headlinings or ceilings, dashboard padding, roofing, etc.), aircraft, ships and boats, trains and buses. They are also used extensively in both home

and office furniture, in packaging, in wall coverings, in cabinet surfaces, and in luggage, footwear and apparel. The outstanding characteristics of these materials are their versatility, durability, ease of maintenance, economy, and adaptability to a wide variety of different stylings.[1/]

The production or "fabrication" of the rolled goods involves among other things, the temporary storage of PVC resin in sealed containers, and the heating of PVC when it is blended with plasticizers and other materials such as fillers, pigments, and stabilizers.[2/] Such storage and heating have the potential for the release to the atmosphere of whatever unreacted or "free" VCM is found in the PVC resin. The amount of such VCM varies with the kind of PVC resin and with the manufacturing process used to make the PVC resin. See, e.g., App. 3490.

Chemical Fabrics and Film Association (the "Association") is a trade association of a small number of companies engaged in fabricating operations using PVC resin as a principal raw material.

1/ See generally Record, Item 4, "Record for Comments on Proposed Standard for Vinyl Chloride," June 10, 1974, Statement of Chemical Fabrics and Film Association (hereinafter "June 10, 1974, CFFA Statement").

2/ The best available evidence shows that futher use of these rolled goods or other fabricated products does not involve any potential to release VCM. See, e.g., App. 2697; see generally App. 004.

The Association's membership is varied, including small companies that are engaged only in PVC fabricating operations and related sales of products, large chemical companies that manufacture PVC and fabricate products from it, and large automobile companies that fabricate extensive amounts of automobile components for their own use. The Association's domestic members last year produced $550 million worth of vinyl materials, consisting of 289 million linear yards of supported material (about 65-70 percent of domestic production) and 170 million pounds of unsupported material (a much smaller percentage of domestic production). The Association's members employ about 10,000 production and maintenance workers in producing vinyl materials, with an estimated annual payroll of about $100 million.[1/] Although these interests are substantial, they are only a small part of the totals for American workers employed by vinyl processors and fabricators.[2/]

In the administrative rulemaking proceedings that led to the regulation being challenged here, the Association expressed support for protection, to the extent feasible, of employees actually exposed to VCM, even where exposure levels were well below the lowest levels for which there was evidence that harm

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1/ See generally June 10, 1974, Statement of CFFA (Item 4 of Record).

2/ App. 626-27, 749, 752.

could result.[1] The Association objected, however, to the infeasibility of the "no detectable" VCM level and the extensive respirator-use requirements of the proposed permanent standard (published at 39 Fed. Reg. 16896, May 10, 1974) that was the focus of the rulemaking. The Association also surveyed its members with respect to, and reported to OSHA concerning, the maximum feasible reductions of exposure levels that it was agreed could be achieved (without respirator use). These levels ranged from an average in 1974 of 15 parts per million ("ppm") with a short term maximum of 30 ppm, to an average, in 1977, of 5 ppm with a short term maximum of 10 ppm.[2] This evidence, and much more extensive but similar evidence as to what was feasible in production of VCM and PVC, apparently was simply ignored by OSHA in promulgating the permanent standard. That imposed, for all segments of the industry, exposure limits of an eight hour average of 1 ppm and a 15 minute average of 5 ppm.[3] OSHA's

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1/ See generally June 10, 1974, Statement of CFFA (Item 4 of Record); Item 141 of Record, August 23, 1974, Supplemental Statement of CFFA.

2/ See Record, Item 141, August 23, 1974, Supplemental Statement of CFFA. The Association also objected to the required "Cancer-Suspect Agent" warning signs and labels as excessively alarming, potentially harmful, and unnecessary.

3/ The permanent standard also imposes upon fabricators with exposure levels above one half part per million, extensive requirements for monitoring the working environment, for medical surveillance, for record keeping, for reporting to OSHA, and for controlling access to the work place.

discard of this evidence as to feasibility is underscored by the fact that the Association's members have to the best of their knowledge experienced no adverse employee health experience and no evidence whatsoever was offered during the rulemaking proceeding that exposures at these feasibility levels had ever harmed anyone. Indeed, the only evidence documenting actual employee experience with low level exposures, covering more than 30 years experience at the Dow Chemical Company, showed no adverse health effects at levels below 200 ppm.[1/]

The Association has a twofold concern with the permanent standard that is direct and concrete. First is the uncertainty, to say the least, of the technological and economic feasibility of compliance by those engaged in fabricating operations. Of even more importance is whether the producers of PVC will be able to continue in operation or to produce adequate supplies of PVC. It now appears that they cannot, technologically or economically, sustain continued production in compliance with the standard. Termination of supply of PVC would of course be fatal to the fabricating operations of the Association's members -- and for many, those fabricating operations are all, or the major part, of the members' businesses.

1/ App. 1183-1200, 1207.

Indeed, even a reduction of PVC supply, which is inevitable (see, e.g., App. 3555), will have a substantial adverse economic impact upon members of the Association, and upon their customers as well. For example, one member that has for years been fabricating vinyl products both to supply the needs of its own other manufacturing operations and to supply a network of independent distributors of vinyl wall coverings, has recently concluded that reductions in PVC supply attributable to the standard will preclude it from satisfying both its own needs and those of its distributors, and it has notified the distributors in writing that it is discontinuing its sales to them. There were 59 such distributors, some of whom had purchased more than one-half million dollars worth of the wall coverings annually. At the very least, similar action seems in store for many other members of the Association.

The Association also has a more general but nonetheless real concern with OSHA's action in promulgating the permanent standard in disregard of the overwhelming weight of the evidence as to feasibility - quite simply, an interest in having safety and health standards promulgated on the basis of the best available evidence, rather than conjecture, political pressure, or other nonfactual bases. This is clearly what Congress intended when it provided that the scope of judicial review would be "substantial evidence in the record as a whole." Insistence upon

a firm factual foundation for OSHA's regulatory standards will not only provide the fairness that Congress intended, but will also encourage employers and employees alike to present factual data in future rulemaking proceedings. Such data is sorely needed if OSHA is to discharge its duties well, and those duties are of very substantial importance, to employees, to employers, to the general economy, and to the public at large. Where will the incentive be to go to the effort and expense of accumulating and presenting good evidence, if OSHA is free to continue to disregard it, and to promulgate standards lacking a substantial factual basis?

ARGUMENT

I. THE OCCUPATIONAL SAFETY AND HEALTH ACT REQUIRES THAT THE VINYL CHLORIDE STANDARD BE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD CONSIDERED AS A WHOLE.

In deliberating upon the proposed legislation that was to become the Occupational Safety and Health Act, Congress readily determined that broad authority to prescribe health and safety standards and otherwise to administer the Act should be conferred upon some administrative agency. Although it was generally assumed that the Department of Labor would receive authority to inspect places of employment as a check on compliance with the Act, there was much concern that Labor might be inclined to favor its organized-labor political constituency over employers, so that to assure fairness to all, and to enhance prospects for enactment of the proposed legislation, important limits were placed on Labor's authority.[1/] Thus it was that adjudicatory authority to determine, in contested cases, whether the Act or regulatory standards promulgated thereunder had been violated, was placed in a new agency outside of the Department of Labor, the Occupational Safety and Health Review Commission. See 29 U.S.C. §§ 659, 660.

1/ See, e.g., Florida Peach Growers Association, Inc. v. Department of Labor, 489 F.2d 120, 131-132 (5th Cir. 1974).

There was similar sentiment to vest authority to promulgate safety and health standards in an agency apart from Labor, and the bill that passed the House so provided. The Senate bill did not, and this difference was resolved by a compromise reached in the Conference Committee. Labor would have standard-setting authority, but its setting of standards would be subject to unusually rigorous judicial review. Thus, Congressman Steiger, the Chief House sponsor of the Act, in urging the House to vote favorably for the final adoption of the Conference-reported bill, explained the interrelationship between the permanent rulemaking process and the substantial evidence test for judicial review as follows:

> "The Secretary's standard will only be sustained by the court if it is supported by 'substantial evidence on the record considered as a whole'. Thus, the Secretary must have a record upon which to base his findings and to serve as the basis for judicial review. The act does not provide for an independent board for standard-setting as did the House bill. However, the court review based upon substantial evidence provides a sufficient element of fairness to satisfy me that [the] conference report should be accepted." (116 Cong. Rec. 42206 (December 17, 1970).)

It should also be noted that the Act's requirement of use of the substantial evidence test is complemented by the special requirement in subsection 6(e) of the Act, 29 U.S.C. § 655(e), that OSHA publish a statement of the reasons for rulemaking and

certain other actions in the Federal Register. The interrelated provisions are designed first to encourage development of a record, albeit an "informal" one, which demonstrates the basis for OSHA's action in part by inclusion of an appropriate statement of reasons, and second, to permit a reviewing court to canvas the whole record in a "searching and careful" way, particularly inquiring into the factual predicate for such rules. See Associated Industries of New York State, Inc. v. Department of Labor, 487 F.2d 342 (2d Cir. 1973); Dry Color Manufacturers' Ass'n, Inc. v. Department of Labor, 486 F.2d 98, 105-106 (3d Cir. 1973); cf. Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

Despite the important and perhaps critical role that these judicial-review provisions played in passage of the Act and were intended by the Congress to play in administration of the Act, OSHA has consistently sought to persuade the courts to ignore them. OSHA has attacked them as "anamolous" and "inconsistent" with the informal rulemaking provisions of the Act, and has argued that if standard-setting is to be reviewed at all, the scope of review should only be the "traditional" one of "arbitrary and capricious." With but one exception in the Third Circuit, these arguments have been rejected by the Courts of Appeals including this Court. See, e.g., Associated Industries of New York State, Inc. v. Department of Labor, 487 F.2d 324 (2d Cir.

1974); Florida Peach Growers Association, Inc. v. Department of Labor, 489 F.2d 120 (5th Cir. 1974); National Roofing Contractors Ass'n v. Brennan, 495 F.2d 1294 (7th Cir. 1974); Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974); Dry Color Manufacturers' Ass'n, Inc. v. Department of Labor, 486 F.2d 98 (3d Cir. 1973); cf. Brennan v. Occupational Safety and Health Review Commission (Hanovia Lamp), F.2d , No. 73-1131 (3d Cir. decided August 14, 1974) (applying the Act's single standard for judicial review, "substantial evidence on the record considered as a whole," to a decision by the OSHR Commission).

The one exception has been the Third Circuit's recent decision in Synthetic Organic Chemical Manufacturers Association, et al. v. Brennan, et al., F.2d (No. 74-1129, Aug. 26, 1974) in which a petition for rehearing was denied without opinion on September 25, 1974. There the court recognized that the scope of review intended by Congress was "substantial evidence in the record considered as a whole" but said that it found "it extraordinarily difficult to apply this standard in this case." (typewritten slip opinion, p. 4) The court then characterized certain material aspects of the purported basis for the standards there in question as "nonfactual", "policy", or "legislative" in nature, and held that they need only be supported by a "statement of reasons [that] reflects consideration of factors relevant

under the statute." (Id. at 10.) The substantial-evidence test was to apply only where a standard was based "in whole or in part on factual matters subject to evidentiary development".[1/]

In what clearly appears to be an attempt to use this decision to explain away the evidentiary deficiencies in the vinyl chloride record, OSHA's preamble states:

> Where decisions can be based on record evidence, this has been done. Where, however, factual certainties are lacking or where the facts alone do not provide an answer, policy judgments have been made. (39 Fed. Reg. 35892, App. 35892, App. 003.)

One principal difficulty with this approach is that Congress provided, in the interests of assuring fair and reasonable treatment of employers, that OSHA's regulatory standards be supported by evidence. Apparently OSHA would have this Court ignore the extensive evidence that industry presented as to infeasibility, on the basis that that does not provide "certainty", and would characterize its "conclusions" as to feasibility as "policy judgments" virtually immune from judicial review. That is clearly at odds

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1/ Ibid. The August 26, 1974, decision applied to only one of 14 standards regulating "carcinogens" that were published in the Federal Register on January 29, 1974. Other aspects of those standards were the subject of oral argument before the Court of Appeals for the Third Circuit on October 21, 1974. At that argument, one of the judges who had rendered the August 26 decision stated that "we're going to lean over backwards" to sustain OSHA's regulations since they are designed to protect employees. (Counsel for the Association here are also counsel for the industry petitioners in the Third Circuit case.)

with Congress' intent. Moreover, infeasibility was and is a matter for determination on an evidentiary basis, and in making such a determination OSHA should be required to consider evidence of infeasibility, and to give effect to such evidence where, as was the case in the vinyl chloride rulemaking proceeding, that evidence was well founded and indeed unchallenged except in at most very conclusory terms.[1/] Even if the standard for review were only "arbitrary and capricious", it would be improper for OSHA to ignore evidence placed before it by interested parties. See, e.g., Consumers Union of United States, Inc. v. Consumer Product Safety Commission, 491 F.2d 810, 812 (2d Cir. 1974).

II. THERE IS NOT SUBSTANTIAL EVIDENCE IN THE RECORD CONSIDERED AS A WHOLE TO ESTABLISH THE FEASIBILITY OF THE VINYL CHLORIDE STANDARD OR TO SUSTAIN THE NOTICE AND LABELING REQUIREMENTS OF THE STANDARD.

Regulation in an area such as this is a troublesome and sensitive matter, and care must be exercised to ensure that generalities or statements lacking temperateness (whether

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1/ While recognizing that all industry witnesses testified that a 1 ppm level was not attainable, and that indeed OSHA's own contractor, Foster D. Snell Corporation, agreed for the VCM and PVC industries, the preamble to the vinyl chloride standard notes to the contrary only that labor union spokesmen and Health Research Group had "suggested" that such a level is attainable.

originating among an agency's "constituency" or otherwise) do not become the basis for regulatory action, displacing fact and reasoned analysis. See Hess & Clark, Division of Rhodia, Inc. v. Food & Drug Administration, 495 F.2d 975, 990 (D.C. Cir. 1974);[1/] Florida Peach Growers Association, Inc. v. Department of Labor, 489 F.2d 120, 131-132 (5th Cir. 1974). Given a careful review, OSHA's imposition of the vinyl chloride standard is unsupported by substantial evidence. Moreover, the adverse consequences of such ill-founded regulation upon the Association's members are severe indeed.

In filing this brief as amicus curiae, the Association is aware that the Society of the Plastics Industry, Inc., is presenting general challenges to the vinyl chloride standard, and that in this and other actions (Nos. 74-2286 and 74-2308), Firestone Plastics Company, Hooker Chemicals & Plastics Corporation, and Union Carbide Corporation are challenging the standard

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1/ In Hess & Clark, which dealt with Food and Drug Administration regulation of diethylstilbesterol (DES) as a new animal drug, the Court stated (495 F.2d at 990, n. 45):

> "[T]he courts cannot turn away in fear of confusion when faced by administrative proceedings that appear faulty. Whether the agency's action is procedurally or substantively inadequate, we, as a court, must shoulder the responsibility of thorough judicial review in order to assure fairness to the regulated parties and thereby to further the public interest."

particularly as it applies to the manufacture of vinyl chloride monomer and polyvinyl chloride.[1/] It thus seems appropriate to state the Association's objections to the standard only briefly here.

First, the infeasibility of the standard at the VCM or PVC stages of the industry itself renders the standard infeasible at the fabrication stage. The overwhelming weight of the evidence in the administrative record indicates that the manufacturers of PVC cannot, due to technological matters, meet the "permissible exposure limits", as the preamble to the standard seems to concede (39 Fed. Reg. 35892, App. 003) and as OSHA's own special contractor, the Foster D. Snell Corporation, reported to OSHA. See ibid; App. 003, and App. 3433 et seq. (Final Draft Report of Foster D. Snell. Inc., September 13, 1974). The evidence also clearly indicates that these manufacturers cannot operate their plants with continuous or nearly continuous use of respiratory equipment but that such operations would be required indefinitely by the standard's permissible exposure limits.

Thus, in each of its principal regulatory effects upon the manufacturers of VCM and PVC, the standard is infeasible.

1/ Such awareness and the expedited briefing and oral argument ordered in these actions influenced the Association's decision to proceed as an amicus rather than to file an additional petition for judicial review.

This is of course contrary to the Act, which requires standards to be feasible, technologically and economically. Section 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5); Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 477-78 (D.C. Cir. 1974) ("Congress does not appear to have intended to protect employees by putting their employers out of business - either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible."); S.Rep.No. 91-1282, 91st Cong., 2d Sess, at 58 (1970).

All that OSHA seems to offer in response is its general "belief" that in time the standard will become feasible. See 39 Fed. Reg. 35892, App. 003. This is mere conjecture, not substantial evidence, and thus cannot sustain the standard, even if there were not overwhelming evidence of infeasibility.1/

1/ Quite in contrast to OSHA's readiness to surmise about feasibility is its reluctance to accept any evidence that low levels of exposure have not caused harm. The extensive inquiries and haelth surveys that appear in the record show, for example, no harm whatsoever to employees at fabricating plants, where exposures are generally agreed to be quite low. This view is also supported by the experience of the Association's members. Indeed, Dow introduced evidence that much higher exposure levels, up to 200 ppm, had produced no harm. App. 1183-1200, 1207. OSHA appears to have accorded this evidence no weight (App. 003), apparently because it conceivably could have covered additional prior employees and because it allegedly lacked "statistical significance," a very conclusory label frequently used by OSHA to justify ignoring evidence of favorable human experience.

Even if the effect of the standard were to reduce PVC production by only 30 percent,[1/] it would still have dire effects upon the Association's members and their customers and employees as well. Some product lines have already been withdrawn from the market, and it is clear that many more would have to be discontinued if the standard were upheld. A 30 percent reduction in PVC supplies could render unprofitable the entire fabricating operations of some of the Association's members, and at the very least would significantly reduce employment and otherwise create economic hardship. Among other things there would be drastic reduction in the number of automobiles that could be produced; substitute materials are simply not available in adequate quantities, regardless of price.

With respect to the warning-sign and labeling requirements of the standard ("Cancer-Suspect Agent", App. 009), the Association objects that there is not substantial evidence, or any evidence, that at the very low exposure levels that may prevail in fabricating operations, cancer may be induced in employees. Indeed, the only evidence of human experience at low levels is favorable. Neither is there evidence that the emotionally charged

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1/ For evidence that there is no spare PVC production and that the standard will result in the closing of older plants, see App. 3486, 3555.

word cancer is necessary to apprise employees of any potential dangers. Indeed, the only likely result of the required warnings in fabricating operations is needless emotional distress among employees and their families.

CONCLUSION

Because in material respects it is not supported by substantial evidence in the record as a whole, the vinyl chloride monomer standard (29 C.F.R. § 1910.93q) should be set aside, and remanded to OSHA for promulgation of a standard for which there is sufficient evidence.

Respectfully submitted,

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November 12, 1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Society of the Plastics Industry, Inc., Petitioner, v. Occupational Safety and Health Administration, United States Department of Labor; Peter J. Brennan, Secretary, Department of Labor; and John Stender, Assistant Secretary For Occupational Safety and Health, Respondents.	No. 74-2284

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 1974, two (2) copies of the brief of Chemical Fabrics and Film Association as amicus curiae dated November 12, 1974, were served, by certified mail, return receipt requested, upon each of the separately represented parties in the captioned action, by mail addressed as follows:

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